

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 77-4200

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

DESCO VITRO-GLAZE OF SCHENECTADY, INC.,
AND LOCALS 6 AND 16, BRICKLAYERS, MASONS,
PLASTERERS, MARBLE, TILE, AND TERRAZZO WORKERS,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that:

(a) the Company violated Sections 8(a)(1), (2) and (3) of the Act by (1) interrogating employees about their membership in Local 59 and soliciting them to withdraw from Local 59 on threat of discharge, (2) soliciting its employees to join Locals 6 and 16 and by assisting the Locals to secure membership from its employees by threatening

employees with discharge unless they joined the Locals, and (3) recognizing the Locals as collective bargaining representatives of its helpers and applying its existing contracts, including union security provisions, with the Locals to its helpers;

(b) the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Local 59 and unilaterally discontinuing its monthly contributions on behalf of its helpers to the pension and savings funds maintained by Local 59;

(c) the Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers upon their unconditional requests to return to work;

(2) Whether substantial evidence on the whole record supports the Board's finding that Locals 6 and 16 violated Section 8(b)(1)(A) and (2) of the Act by accepting the Company's unlawful assistance in organizing the helpers, by accepting recognition as the exclusive collective bargaining representatives of the helpers, and by applying their contract with the Company, including union security provisions, to the helpers.

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STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et. seq.) for enforcement of its order issued against Desco Vitro-Glaze of Schenectady, Inc. (herein "the Company") and Locals 6 and 16 of the Bricklayers, Masons, Plasterers, Marble, Tile and Terrazzo Workers ("the Unions" or "the Locals"). (A. 424-432). ^{1/} The Board's decision by Members Jenkins, Penello, and Murphy, issued on June 23, 1977, and is reported at 230 NLRB No. 42. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in Schenectady and Albany, New York, where the Company is engaged as a construction contractor for application of flooring materials.

^{1/} "A." references are to pages of the printed appendix. "GCX" references are to the General Counsel's exhibits lodged by permission with this Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

I. THE BOARD'S FINDINGS OF FACT

A. The Company's collective bargaining history

The Company was started by Joseph LePore, Jr. about 1953, and was acquired by the owner involved here--Joseph Cordi--in 1973 (A. 406; 30-32).^{2/} The Company has employed two classifications of employees:

(1) "helpers" who unload and distribute the flooring materials, mix the adhesives, and prepare the floors for installation (A. 406; 10, 34, 39, 44, 118, 185a-b, 190), and (2) "mechanics" who work with trowels and actually install the flooring materials (A. 406; 34-35, 39-44, 185a-b, 190). The helpers finish the job by cleaning, sanding, grinding and grouting the floor (A. 406; 35, 40).

Throughout LePore's 20 years of ownership, the Company maintained collective bargaining relationships with Locals 6 and 16 for the mechanics (A. 406; 10, 45a, 118).^{3/} The Company dealt with these Unions through the Eastern New York Construction Employers, Inc., an association to which it belonged and assigned its collective bargaining responsibilities (A. 406-407; 45b-c).

Similarly, throughout LePore's ownership, Local 59^{4/} was recognized as the collective bargaining representative of the helpers

^{2/} Originally, the Company mainly installed terrazzo flooring, but these heavy cement materials have been displaced by lighter compositions using latex, epoxies, and acrylics (A. 406; 33, 208a-d).

^{3/} Local 6 has jurisdiction in the Albany area, and Local 16 in Schenectady (A. 118, 284-285).

^{4/} International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers, Marble Mosaic and Terrazzo Workers Helpers, AFL-CIO, Local 59.

(A. 407; 17, 32). Although the Company executed no contracts with Local 59 and did not belong to any associations through which it contracted with Local 59, it acceded to the terms of agreements negotiated between Local 59 and the Capital District Tile, Marble, Terrazzo and Slate Contractors' Association (A. 407; 36-37, 120, 490-498). In 1967, the Company executed a letter of intent to be bound by the terms of that agreement and to pay the wages and benefits of the agreement retroactively (A. 407; 12, 16, 483). In fact, the Company paid its helpers the wages and benefits prescribed in the agreement between Local 59 and the Association during LePore's ownership (A. 407; 122-123). While LePore owned the Company, its helpers were either members of Local 59, were referred to the Company by Local 59, or if hired off the street when Local 59 had no available helpers, were referred to the Local by the Company if their performance was satisfactory and they were interested in taking up the trade (A. 407; 11, 123-124, 165b-c).

B. Cordi acquires the Company and pays
helpers according to Local 59's wage
and benefit schedule

In February 1972, Joseph Cordi came to work for the Company with the intention of acquiring the business from LePore (A. 407; 31-32). In January 1973, the acquisition was completed (A. 407; 31-32). From February 1973 until December 1974, the Company continued to pay its helpers the wage rates specified in the contract between Local 59 and the Capital District Tile, Marble, Terrazzo and Slate Contractors Association (A. 407; 325). In addition, the Company made monthly payments to

several Local 59-maintained funds on behalf of its employees (A. 408; 107). From January 1973 to December 1974, Cordi signed a "Monthly Report of Saving Deposits for Tile, Marble and Terrazzo Workers Helpers of the Metropolitan Capital District," [sic] which listed certain employees and the amounts deposited in their names (A. 408; 107, 115-116, 129-130, GCX 8). Cordi also signed monthly reports listing the same employees, which recorded monthly contributions on their behalf to the Capital Area Masons' Pension Fund (A. 408; 110, GCX 9). The form recited that only pension funds were required on behalf of Local "No. 59-Tile Helpers" (A. 408; GCX 9). Both the savings plan and pension fund deposits were required of employers in Article II of Local 59's contract (A. 408; 490-498).

Between December 1972 and December 1974, the Company employed between four and nine helpers on whose behalf it paid these benefits (408; 111).^{6/} As of December 1974, there were five helpers: Domenico Coppola, Dominick Marotta, Allie Mohamad, Constantinos Psarras, and Giovanni Segatto (408; 1344, GCX 8, 9).^{7/} All were members of Local 59 and Cordi

^{6/} Christos Glantzis was employed as a helper and was a member of Local 59 until October, 1974, when he was upgraded to mechanic status (A. 408; 157, 200). It was an accepted practice for experienced helpers to move on to the mechanic's classification and become members of a mechanic's local. Thus, Local 59 was utilized as a training ground or apprenticeship program for helpers to become mechanics, and this was the normal progression which Glantzis followed (A. 407; 246-247).

^{7/} Segatto appears to be the same person also referred to in the record as John Segatto (A. 256, 285).

knew of the membership status of all but Psarras (A. 408; 134, 227a, 246-247, 321-322). When Psarras was hired in October 1974, he was told by Company Supervisor Kenneth King that he would have to join Local 59 (A. 408; 46, 48, 165a). In January 1975, three additional helpers were hired: Dimitrios Evangelidis, John Sitiriou, and J.C. Hamilton. All three signed application blanks to join Local 59 (A. 408; 75a, 136, 167, 484, 485, 487).

C. Cordi interrogates his employees, solicits their withdrawal from Local 59, and assists Locals 6 and 16 in gaining the employees as members

On January 24, 1975,^{8/} David Lavenberg, business agent for Local 59, visited the Company's job site at the Empire State Plaza in Albany (A. 411; 50a, 138). He received applications for union membership and down payments on initiation fees from employees Hamilton and Sitiriou (A. 411; 52, 55, 57, 136, 138-139, 171-172, 484-485). Sitiriou told Company Supervisor King that he had joined Local 59 (A. 411; 173, 270). King responded that Sitiriou could have waited a couple of weeks before joining Local 59 (A. 411; 173).

Two days later, Cordi called Lavenberg and accused him of doing "a sneaky thing by going on the job site and signing up these two people when [he] did it with coercion, and possibly the threat of their employment . . ." (A. 411; 140-141). Lavenberg replied that the employees had applied of their own free will and agreed to meet Cordi at the job site the next day (A. 411; 141). Before Lavenberg arrived the next day,

^{8/} Unless otherwise indicated, all dates hereafter are 1975.

Cordi and King approached Sitiriou and asked him if he had joined Local 59 (A. 411; 173). Sitiriou admitted that he had applied and given a \$100 deposit (A. 411; 139, 172-173). He asked, "why, did I [do] something wrong?" Both Cordi and King replied, "No, that's okay" (A. 411; 185c-d).

When Lavenberg came to the job site, he went with Cordi and King to speak to Hamilton (A. 411; 142). Cordi said, "Mr. Lavenberg coerced you into making this application, didn't he?" and Hamilton said "yes, he did" (A. 411; 142). Lavenberg told Hamilton he had not coerced him, but if he did not want to join Local 59 on his own volition, he would return his initiation deposit. Lavenberg then made out a check for \$100, the amount of the deposit, and gave it to Hamilton (A. 411-412; 142-143). Cordi, King, and Lavenberg then went to Sitiriou and asked him whether he had been coerced into making an application, and Sitiriou did not reply. At this point Cordi asked him, "Are you going to stay with me, or are you going with him?" (A. 412; 143, 174). Sitiriou then responded, "Of course I'm with you, you're my boss, you know, you pay me" (A. 412; 174, 279). "[R]ather than put the man on the spot," Lavenberg made out a check to return his deposit (A. 412; 143, 500).

On January 29, King approached employee Psarras and told him that the Company had decided not to have any more helpers and asked him if he would like to become a mechanic rather than lose his job (A. 412; 59, 75). When Psarras asked how he could become a mechanic, King replied, "You're going to join another union but you're still going to do the same job as a helper you are now but we're going to stop having anything to do with the helpers. So what do you want to do[?]" (A. 412; 59).

On the same day King asked Mohamad if he wanted to become a mason. Mohamad asked when the change would occur and what he would be doing (A. 412; 193). King told him that his job would not change and that the business agent from Local 6, Aldo Malossi, would be at the job site the following day to sign him up (A. 419; 193). According to Cordi, King also took a "survey" of the other helpers "to find out if they were interested in being promoted and if they were interested in becoming mechanics and joining Local #6 or #16" (A. 412; 282).^{9/}

On January 30, King summoned Mohamad to the office because Malossi was present and could sign him up for membership in Local 6 (A. 412; 193-194). Mohamad questioned what his new status would be, and Cordi assured him he would start as a journeyman, not as an apprentice mason (A. 412; 193). Mohamad gave Malossi a deposit and received a receipt (A. 412; 195). The same scene was repeated with Hamilton, in which Cordi asked him if he was interested in becoming a mechanic, Hamilton replied that he was, and Hamilton gave Malossi a deposit (A. 412; 283). On the same day, according to Cordi, he signed an agreement with one or both of the Locals (A. 410; 297).

The next day, Vince Riggi, business agent of Local 16, visited the job site at Cordi's request, and employees Psarras, Sitiriou, Evangelidis, Marotta, Segatto, and Coppola were summoned to Cordi's office (A. 412; 60, 79, 177). Cordi asked each employee if he wanted to join Local 16. All the employees joined, and Cordi lent \$50 each to Psarras and Sitiriou to make down payments on the initiation fee (A. 412; 62, 63, 64, 177-178). Psarras received a receipt from Riggi for his down payment lent to him by Cordi (A. 412; 62-63, 486).^{10/}

^{9/} King did not testify.

^{10/} Neither Malossi of Local 6 nor Riggi of Local 16 testified.

The next week on February 7, Riggi returned to the job site office and, in the presence of Cordi and King, requested payments from Psarras, Evangelidis, and Sitiriou (A. 412-413; 64-65, 179). Sitiriou and Evangelidis made arrangements to pay in about 10 days (A. 413; 179-180). They went to Riggi's office on the appointed day and attempted to pay \$20 on account, but Riggi refused the money, saying "we've got a big question coming up this week so I can't take this money" (A. 413; 66, 72a, 84, 90a, 180).

As he was passing out the employees' paychecks on February 27, Cordi asked Psarras and Evangelidis whether they had given Riggi the rest of the money they owed him (A. 413; 66-67, 69a). When they replied that they had not, and Evangelidis added that he had attempted to pay but Riggi had refused the money, Cordi told them the reason Riggi had refused was that they only offered him \$20 (A. 413; 67; 71-72, 180). Cordi told them "you better pay the rest of the money, both of you if you want to keep the job. Otherwise you aren't going to have a job if you don't join the Union" (A. 413; 66-67).

D. Cordi states that a change in operations resulted in no further need for Local 59 helpers

On February 18, after a telephone conversation a week earlier with Cordi, Gerald Bombassaro, an International Representative of Local 59's parent union, ^{11/} visited Cordi's job site in Albany to try to get a signed collective bargaining agreement and to discuss the fact that Local 59 members

^{11/} Local 59 is affiliated with the Marble Tile and Terrazzo Helpers' International Union (A. 211).

were "being issued union books from the Bricklayers Organization" (A. 409; 211, 214, 148-149). Cordi refused Lavenberg and Bombassaro's request to sign a collective bargaining agreement (A. 410; 214-215).^{12/} Cordi stated that the Company had changed its method of doing business and no longer needed Local 59 helpers (A. 409-410; 214-215). Cordi accused Lavenberg of harassing him and told Bombassaro that he had entered into an agreement in another association, the National Association of Decorative Architectural Finishers (NADAF) (A. 410; 150, 215).^{13/} At this point in the conversation, employees Mohamad, Segatto, and Marotta joined the group and Cordi said to Mohamad, "tell this man. Haven't we been one big happy family here? I treat you fellows good. I give you everything you deserve. Isn't that true?" Cordi then pointed to Lavenberg and said, "What has this man in Local 59 ever done for you?" (A. 410; 150, 216, 306, 323). Mohamad did not reply (A. 410; 199-200). Bombassaro then asked Cordi, in the presence of the three employees, whether the Local 59 members would be laid off or fired if they didn't join Local 6 or 16, and Cordi replied "It's hard to say" (A. 410; 200, 217).

^{12/} The Board, contrary to the Administrative Law Judge, found that the Company's refusal to sign the contract negotiated between Local 59 and the Capital District Association was not contrary to its prior practice, and that the refusal therefore did not violate Section 8(a)(5) of the Act (A. 426-427).

^{13/} Pursuant to its membership in NADAF, the Company was a party to contracts with a chemical products division of the Bricklayers and Painters International Unions (A. 410; 217, 509-513). Cordi had been under the mistaken impression that the Company was a member of NADAF, and upon learning that he was in error, he signed the NADAF agreement in January 1975 (A. 410; 230, 236, 318).

E. Cordi raises the helpers' wages and benefits to conform to Local 6 and 16 contract terms; the employees go on strike

After all the helpers had made applications and paid initiation fees to Locals 6 and 16 in late January, Cordi raised their wages and fringe benefits to the higher rates set forth in the agreements maintained by those Unions (A. 410; 154, 317). The employees, both before and after their "upgrading" and membership in Local 6 and 16, spent most of their time performing work traditionally assigned to the helpers' classification (A. 408, 410-411, 32-35, 181, 198-199, 210, 222-227, 243, 246-247). Although occasionally the more experienced helpers did some work with the trowel, 90 to 95 percent of the employees' time was spent doing helpers' work (A. 408-409; 198-199, 262, 305).

On March 31, Local 59 began a strike against the Company and picketed for two weeks at the Empire Plaza job site and for one week at another Company job site (A. 413; 87, 91, 155). Employees Mohamad, Sitiriou, and Evangelidis participated in the strike, which ended April 11 (A. 414; 165d, 165e).^{14/} On June 19, Lavenberg made an unconditional offer to return to work on behalf of all the strikers, including Evangelidis (A. 414; 88, 159a, 502a). The Company refused to reinstate the strikers.

^{14/} Evangelidis returned to work for four days, and then went back on strike to support the other strikers (A. 414; 87-88, 89).

II. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board found that the Company violated Section 8(a)(1) of the Act by interrogating, threatening, and soliciting its employees to withdraw their membership from Local 59. The Board found that the Company violated Section 8(a)(2) and (1) of the Act by soliciting its employees to join Locals 6 and 16 and by assisting those Unions to secure membership applications from the employees, and by recognizing the Unions as collective bargaining representatives of the helpers and applying the Unions' contracts to the helpers (A. 424-432, 414). The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by unlawfully applying union security provisions of Locals 6 and 16 contracts to the helpers. Finally, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Local 59 and unilaterally discontinuing its monthly contributions on behalf of its helpers to the pension and saving funds maintained under Local 59's contract (A. 424-432, 414).

The Board found that the Unions violated Section 8(b)(1)(A) and (2) of the Act by accepting the Company's unlawful assistance in organizing the helpers, by demanding and accepting recognition as the exclusive collective bargaining representatives of the helpers, and by applying their contracts with the Company, including the union security provisions, to the helpers (A. 424-432, 414).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from "in any other manner" interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Affirmatively, the order requires the Company to withdraw and withhold recognition from Locals 6 and 16 as the collective bargaining representatives of its helpers unless and until those Locals are certified as the exclusive representatives of the employees (A. 427-430). The order requires the Company, jointly and severally with the Unions, to reimburse its helpers for all initiation fees and dues paid pursuant to contracts with the Unions, to offer the unfair labor practice strikers reinstatement to their former or substantially equivalent positions, make them whole for any loss of earnings from five days after the unconditional offer to return to work to the date of the Company's offer of reinstatement, and to post the appropriate notices (A. 429-430, 415-417).

The order requires the Unions to cease and desist from the unfair labor practices found, reimburse the helpers, jointly and severally with the Company, for any fees or dues paid pursuant to their contracts with the Company, and to post the appropriate notices (A. 429-430, 417-419).^{15/}

^{15/} A prior hearing was held in this case before a different Administrative Law Judge who issued a decision on September 8, 1975 (A. 433-452). After a review of the record and decision in that hearing, the Board ordered a de novo hearing before the present Administrative Law Judge because the prior judge's conduct prevented "both the General Counsel and Respondent Employer . . . from presenting and fully developing relevant evidence at the hearing to an extent which . . . constitutes a denial of due process" (A. 470-472).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE
RECORD SUPPORTS THE BOARD'S FINDINGS
THAT THE COMPANY VIOLATED SECTIONS
8(a)(1), (2), (3) AND (5) OF THE ACT

A. Summary

This is a case of an employer "shoving" a group of employees out of a union which had long represented them into two other unions. N.L.R.B. v. Finishline Industries, Inc., 451 F.2d 1280, 1281 (C.A. 9, 1971) ("An employer has no more right to shove his employees into a bona fide outside union that does not represent them than it has to shove them into a company union."); N.L.R.B. v. Fotochrome, Inc., 343 F.2d 631, 633 (C.A. 2, 1965), cert. denied, 382 U.S. 833.

Thus, after 20 years of recognizing and dealing with Local 59 as the bargaining representative of its helpers, the Company abruptly launched a month-long campaign of interrogation interwoven with direct and implied threats of discharge by which it forced its eight helpers to switch their membership and support from Local 59 to Locals 6 and 16. It then recognized those two locals as the helpers' bargaining representative and sought to enforce the union security contract of the Locals. The chronology was as follows:

On January 24, Company owner Cordi and Supervisor King by implied demands caused two helpers--Hamilton and Sitiriou--to take back deposits they had made on applications for membership in Local 59. When Sitiriou failed to respond promptly, Cordi demanded, in the presence of Local 59 Business Agent Lavenberg, "Are you going to stay with me, or are you going with him?" Sitiriou replied, "I'm with you, you're the boss. . . you pay me."

Five days later, on January 29, Supervisor King told helpers Psarras and Mohamad that the Company was changing the helpers' jobs to mechanic status without any change of duties, but that they would have to change unions. King asked Psarras whether he would like to become a mechanic rather than lose his job. He told Mohamad that the business agent from Local 6 would be at the job site the next day to sign him up. The next day, January 30, helpers Mohamad and Hamilton were called to the office to meet Local 6 business agent Malossi. Company owner Cordi and Supervisor King were present. After Cordi explained the change in job titles, Mohamad and Hamilton both gave Malossi deposits toward initiation fees in Local 6. Cordi admittedly signed a contract with Local 6 the same day.

The following day, January 31, the Company summoned six other helpers to Cordi's office to meet Local 16 business agent Riggi. Cordi asked each if he wanted to join Local 16, and all joined. Cordi lent two—Psarras and Sitiriou—\$50 each to make down payments on their initiation fees. The next week, on February 7, Riggi returned, and, in the presence of Cordi and King, requested further payments from Psarras, Sitiriou, and Evangelidis, and they arranged to pay later. On February 27, while passing out paychecks, Cordi asked Psarras and Evangelidis whether they had paid Local 16. When they said they had not, Cordi responded that they had better pay up, if they wanted to keep their jobs, because "you aren't going to have a job if you don't join the Union."^{16/}

^{16/} There is no significant conflict of evidence as to these events, to which Cordi also testified (A. 275-297). Although Cordi made a general denial of soliciting employees either to withdraw from Local 59 or to join Locals 6 and 16, his testimony as to his actual conduct was virtually the same as that of the employees. (Continued)

B. The Company's conduct violated Sections 8(a)(1), (2) and (3)

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing. . ."

[emphasis added]. Section 8(a)(1) forbids an employer "to interfere with, restrain, or coerce" employees in the exercise of these rights, and Section 8(a)(2) forbids an employer to "interfere with the formation or administration of any labor organization or contribute financial or other support to it." Finally, Section 8(a)(3) precludes execution of a union security agreement with an assisted union.

Thus, as in N.L.R.B. v. Vernitron Electric Components, 548 F.2d 24, 26 (C.A. 1, 1977), "the employer's shepherding of employees . . . to the union organizational meetings [created] in the employees' minds an impression of employer support for the union and a sense of pressure in support of the union." Company President Cordi and Supervisor King plainly assisted Locals 6 and 16 in signing up the employees by prearranging the sign-up meetings and by participating in the selection

16/ (Continued)

As to his inquiries to Evangelidis, Psarras, and Sitiriou regarding their failure to pay the balance of their deposits on Local 16's initiation fees, Cordi testified that he told them that "they might not be able to work because of non union status" (A. 294) and that "this wasn't kid stuff that this was a union job, if we didn't employ union people there may be trouble and that we were required to provide union people on this job" (A. 295).

Cordi also testified that the meetings of the employees with both Local 6 and Local 16 agents were prearranged by him (A. 281-283, 288), and the employees were divided between the two locals on the basis of where they lived (A. 284-285).

of the union to which each employee would be assigned. N.L.R.B. v. Midtown Service Co., 425 F.2d 665, 670 (C.A. 2, 1970), N.L.R.B. v. A & S Electronic Die Corp., 423 F.2d 218, 221 (C.A. 2, 1970), cert. denied, 400 U.S. 833. Further, the presence of Cordi and Supervisor King at those meetings enabled them to monitor the employees' signing up with those locals and thus coerced the employees in their choice of a union for bargaining representative. Vernitron, supra, loc. cit. Cordi further displayed his support of Local 16 by lending two employees money to make down payments toward their initiation fees. Thus, the Company's whole course of conduct—which included interrogation of employees about their membership in Local 59,^{17/} expressions of antagonism toward Local 59 and its business agent, and instigation and monitoring of meetings of employees with the favored locals for the avowed purpose of having the employees sign with those locals—was directed toward altering the helpers' allegiance from Local 59 to the Unions with which the Company

^{17/} It is well settled that interrogation violates Section 8(a)(1) of the Act "when it is associated with threats, be they express or implied, or promises, or 'form(s) part of an overall pattern tending to restrain or coerce employees with regard to their protected activities.'" N.L.R.B. v. Deutsch Co., 445 F.2d 902, 904 (C.A. 9, 1971). See also N.L.R.B. v. Rubin, 424 F.2d 748, 751 (C.A. 2, 1970).

Here, Cordi's interrogation of Hamilton and Sitiriou about their applications for membership in Local 59 was preparatory to its effort to replace that union with Locals 6 and 16. Further, the interrogation of Sitiriou was accompanied by the implied threat of discharge that, if he chose to stay with Local 59, he could not stay with the Company. Finally, Cordi said, in the presence of three helpers—Mohamad, Segatto, and Marotta—that it would be "hard to say" whether they would be discharged if they failed to join Local 6 and 16 (A. 410; 200, 217).

preferred to negotiate. See Amalgamated Local 355 v. N.L.R.B., 481 F.2d 996, 1002 (C.A. 2, 1973). These actions clearly show "a pattern of company assistance" and amply support the Board's finding that the Unions were assisted unions when the Company signed a contract with Local 6 on January 30 and thereafter recognized both Local 6 and 16 as the helpers' bargaining agents. Id. at 1002, n. 8.

After recognizing the Unions, Cordi also undertook to enforce the union security provisions of Local 16's contract by threatening Sitiriou, Psarras, and Evangelidis with discharge if they failed to complete payment of their initiation fees (A. 292-295). Since Section 8(a)(3) of the Act permits a union security agreement only with a union "not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice," the Company's attempts to enforce its union security agreement with the Locals violated Section 8(a)(3). N.L.R.B. v. Getlan Iron Works, 377 F.2d 894, 896-897 (C.A. 2, 1967).

- C. The Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Local 59 and unilaterally discontinuing its monthly contributions on behalf of its helpers to the Local 59 pension and savings funds

It is well settled that a bargaining relationship established by voluntary recognition may not be broken off at will. See N.L.R.B. v. Broad Street Hospital, 452 F.2d 302, 304-305 (C.A. 3, 1971); N.L.R.B. v. San Clemente Publishing Corp., 408 F.2d 367 (C.A. 9, 1969). It is equally well settled that unilateral changes, when made in disregard of a duly-recognized collective bargaining representative, violate the Act. N.L.R.B. v. Katz, 369 U.S. 736, 743-744 (1962); N.L.R.B. v. General Electric Co., 418 F.2d 736, 746 (C.A. 2, 1969), cert. denied, 397 U.S. 965; Firch Baking Co. v. N.L.R.B. 479 F.2d 732, 735 (C.A. 2, 1973), cert. denied, 414 U.S. 1032.

In the instant case, the Company concededly refused to continue recognition of Local 59 and concededly made unilateral changes in the terms and conditions of employment without consulting Local 59. The only issue here is whether Local 59 was in fact the recognized representative of the employees and, as such, entitled to continued recognition and an opportunity to bargain about proposed changes. The Board determined that^{18/} it was the recognized representative.

^{18/} In making this determination, the Board properly relied on circumstantial as well as direct evidence, and its inferences must stand if reasonable and supported by substantial evidence on the record as a whole. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951). A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." N.L.R.B. v. Walton Mfg. Co., 369 U.S. 404, 405 (1962).

The credited testimony and documentary evidence established that Local 59 had been the exclusive representative of the Company's helpers for about 20 years. Although the Company did not execute contracts with Local 59 or belong to a multiemployer association which contracted with the Local, the Company did accede to the terms of a contract negotiated between Local 59 and a contractors' association. The Company paid the helpers wages specified in this contract, and each month President Cordi signed monthly payment reports listing the Company's contributions to the Local 59 pension and savings funds. Article II of the contract between the Local and the association required these payments to be made. The Company's voluntary recognition of the Local implied by these actions was as binding as any other form of recognition, and it bound the Company to continue dealing with Local 59 as the exclusive representative of its helpers, absent evidence that Local 59 had lost its majority support without Company interference. N.L.R.B. v. Bradford Dyeing Assn., 310 U.S. 318, 340 (1940).

In addition to the Company's knowledge of the helpers' membership in Local 59 implicit in the fringe benefit payments, Company President Cordi admitted that he knew that all the helpers except new employee Psarras were members of the Local (A. 408, 134, 227a, 246-247). Supervisor King told Psarras at the time he was hired that he would have to join Local 59. In January 1975, before the Company began its unlawful support of Local 6 and 16, the three new helpers hired had made applications to Local 59. Thus, nothing in the record suggests that there has been

any employee discontent with Local 59's performance as exclusive representative of the helpers, and there was no evidence that Local 59 engaged in any coercion to induce employees to apply for membership.

Before the Board, the Company contended that, because of changes in the industry, there ceased to be work for a separate unit of helpers. The Board found no credible evidence to support this assertion and instead determined that the changes which had occurred involved the flooring materials being installed rather than the division of work (A. 408-409). The employees testified that even after their "promotions" and change of membership to Local 6 or 16, the nature of their work assignments did not change, and they spent their time performing the work traditionally assigned to the helpers' classification. The Board specifically credited the employees' description of their work, and discredited President Cordi's assertions that all the employees worked interchangeably as a "team". (A. 408, 411).^{18/}

The Company also urged that Local 59's majority status was eroded because the helpers, of their own free will, agreed to join Locals 6 and 16 and transferred their allegiance to those Unions in late January after

^{18/} These findings of the Board rest on the Administrative Law Judge's resolution of credibility based upon the demeanor of the witnesses. It is settled law that it is within the special province of the Administrative Law Judge and the Board to resolve the question of credibility and those resolutions should not be overturned by a reviewing court absent extraordinary circumstances not present here. A & S Electronic Die Corp., supra, 423 F.2d at 220.

The Administrative Law Judge discredited Cordi's testimony where it was in conflict with that of other witnesses, relying upon Cordi's demeanor, evasiveness, and contradictions between his testimony in this hearing and the prior one (A. 411). In exceptions to the Board, the Company objected to the consideration of Cordi's prior testimony. This exception was without merit since the Company specifically asked the Administrative Law Judge to take judicial notice of Cordi's entire prior testimony and agreed that it should be considered for all purposes (A. 116).

they were promoted to the mechanics' classification. On this record, the Company cannot seriously contend that the employees' decision to join the Unions was voluntary in light of the Company's blatantly unlawful support for those Unions. "Once illegal assistance is found, followed by dissipation of [the incumbent's] majority, the refusal to bargain with [the incumbent] was plainly a Section 8(a)(5) and (1) violation. A condition to any right of the employer to refuse . . . to bargain with a union which he reasonably thinks has lost its majority is that the loss of majority was not attributable to unfair labor practices of the employer." N.L.R.B. v. Fotochrome, Inc., *supra*, 343 F.2d at 633; Bradford Dyeing Assn., *supra*, 310 U.S. at 339-340; Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 687 (1944). Otherwise the employer would be allowed to reap the benefit of his wrongdoing and further illegality would be encouraged. See Komat Construction, Inc. v. N.L.R.B., 458 F.2d 317, 322-323, 326 (C.A. 8, 1972).

In sum, the Company has demonstrated no reasonable grounds for unilaterally terminating its 20-year recognition of Local 59 and discontinuing payments to the savings and pension plans without negotiation with Local 59. By this conduct, the Company violated Section 8(a)(5) and (1) of the Act. See N.L.R.B. v. A. Lasaponara & Sons, Inc., 541 F.2d 992, 996 (C.A. 2, 1976), cert. denied, 430 U.S. 914.

- D. The Company violated Section 8(a)(3) and (1) of the Act by refusing to reinstate unfair labor practice strikers upon their unconditional requests to return to work

It is well settled that a strike in protest over employer violations of the Act is an "unfair labor practice strike" and that "striking employees do not lose their status and are entitled to reinstatement . . . even if replacements for them have been made." Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278 (1956). Moreover, it is clear that a "strike may be an unfair practice strike even though it also has economic objectives . . . Unfair labor practice strikers must be rehired on demand . . . even though there were also other causes of the strike." N.L.R.B. v. Fitzgerald Mills Corp., 313 F.2d 260, 269 (C.A. 2, 1963), cert. denied, 375 U.S. 834, and cases cited therein. In short, "if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike . . . and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike." General Drivers and Helpers, Local 662 v. N.L.R.B., 302 F.2d 908, 911 (C.A.D.C., 1962), cert. denied, 371 U.S. 827.

Local 59 began a strike against the Company because of its unfair labor practices in recognizing and supporting Locals 6 and 16 when it was obligated to continue recognizing Local 59. It is clear that the Company's illegal course of conduct contributed to the helpers' frustration, and led to the decision to strike. Picketing at two of the Company's job sites began March 31 and continued until April 11 (A. 165d). On June 19,

Local 59 business agent Lavenberg made an unconditional offer to return to work on behalf of all seven helpers, listing each by name (A. 503a). The Company has refused to reinstate the employees, and the Board properly found that the Company thereby violated Section 8(a)(3) and (1) of the Act. Since the strikers were unfair labor practice strikers, they were entitled upon requesting reinstatement to immediate reinstatement to their former positions, even if this meant the replacement of any striker replacements hired during the course of the strike. See N.L.R.B. v. L.E. Farrell Co., Inc., 360 F.2d 205, 208 (C.A. 2, 1966); Larand Leisurelies, Inc. v. N.L.R.B., 523 F.2d 814, 820 (C.A. 6, 1975).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT LOCALS 6 AND 16 VIOLATED SECTION 8(b)(1)(A) AND (2) BY ACCEPTING THE COMPANY'S UNLAWFUL ASSISTANCE IN ORGANIZING THE HELPERS, BY ACCEPTING RECOGNITION AS THE EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATIVES OF THE HELPERS, AND BY APPLYING THEIR CONTRACTS WITH THE COMPANY, INCLUDING UNION SECURITY PROVISIONS, TO THE HELPERS

As shown above, the Company solicited its employees in the helpers' classification to repudiate Local 59 and coerced them into paying initiation fees to join Locals 6 and 16 on threat of loss of employment for failing to join. The Unions, through their business agents, attended the meetings called and monitored by the employer to sign up its employees, accepted the employees' fees, and thus accepted the Company's assistance and recognition. A union violates Section 8(b)(1)(A) of the Act when it accepts assistance and recognition from an employer at a time when it

does not represent an uncoerced majority of the employees in a unit. N.L.R.B. v. Revere Metal Art Co., Inc., 280 F.2d 96, 99-100 (C.A. 2, 1960), cert. denied, 364 U.S. 894; International Ladies Garment Worker's Union v. N.L.R.B. (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 738-739 (1961).

The Unions contended before the Board that they were unaware of the Company's obligation to continue recognition of Local 59, and therefore they cannot be held to have violated the Act. But the Supreme Court rejected that argument in Bernhard-Altmann, supra, 366 U.S. at 738-739, declaring (footnotes omitted):

To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives. We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices here involved. The act made unlawful by §8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.

Accord: Vernitron, supra, 548 F.2d at 26, n. 2; Amalgamated Local Union 355 v. N.L.R.B., supra, 481 F.2d at 1006; N.L.R.B. v. Raymond Buick, Inc., 445 F.2d 544, 645 (C.A. 2, 1971). Thus, even on the unlikely assumption that the Unions were unaware of the Company's obligation to continue recognition of Local 59, the acceptance of recognition in these circumstances violated Section 8(b)(1)(A) of the Act.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should issue enforcing the Board's order in full.

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February, 1978



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)
)
Petitioner,)
)
v.) No. 77-4200
)
DESCO VITRO-GLAZE OF SCHENECTADY,)
INC.,)
)
Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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